Before the
Federal Communications Commission
Washington, DC 20554

STAMP AND RETURN

In the Matter of	)	
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Jurisdictional Allocation of Wireless Toll Revenues	)	WC Docket No. 06-___
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To: The Commission

PETITION FOR DECLARATORY RULING OF CINGULAR WIRELESS LLC

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SUMMARY

The Commission's recent order addressing universal service fund contribution issues has highlighted a long-standing tension between language used in numerous Commission and Wireline Competition Bureau orders, on the one hand, and Instructions appended to the Telecommunications Reporting Worksheets, on the other. Specifically, on at least six occasions between 1998 and 2006, Commission and Bureau orders have stated that carriers electing to allocate revenues using the so-called "wireless safe harbor" are permitted – or even *required* – to allocate *all* of their end-user telecommunications revenues pursuant to the safe harbor. On three occasions, these statements have been published in the Federal Register. In contrast, the Worksheet Instructions – never themselves published in the Federal Register – have been drafted in a manner that may prohibit use of the safe harbor to allocate wireless toll revenues.

Given the potential conflict between the Commission's orders and its unpublished Instructions, Cingular Wireless LLC asks the Commission to declare that: (1) consistent with its repeated and specific statements in numerous orders, wireless carriers have been permitted to allocate all of their end-user telecommunications revenues, including "toll" revenues, using the "wireless safe harbor"; and (2) to the extent it alters this policy in the future, it will not apply its new approach retroactively prior to the date of such an order and will not seek to enforce any additional regulatory contribution obligations that would arise from such retroactive application or any associated late-payment fees.

As an initial matter, Cingular asks the Commission to clarify that wireless carriers have been permitted to allocate all of their end-user telecommunications revenues using the "wireless safe harbor." This position is consistent with numerous statements made in Commission rulemaking orders, several of which have been published in the Federal Register. These statements constitute "rules" under the Administrative Procedure Act. In contrast, the Commission has never either explained the basis of the Instructions' approach, or published the Instructions in the Federal Register. In these circumstances, the Commission's published statements have governed, and will continue to govern unless and until the Commission adopts an alternative rule.

Moreover, while the Commission is entitled to change its policy going forward, Cingular asks it to declare that it will not apply its new approach *retroactively* prior to the date of any such modification. First, the Commission's statements permitting safe-harbor allocation of all end-user telecommunications revenues are rules, and new rules regarding the same subject matter cannot be applied retroactively. Second, even apart from the bar on retroactive rulemaking, the equitable considerations traditionally analyzed in evaluations of retroactivity all counsel against retroactive application of any new requirement here. Third, even if the Instructions themselves constituted rules, and those rules were given force equal to that enjoyed by the Commission's repeated statements, the result is that carriers have been subject to two *directly conflicting* rules. In these circumstances, no carrier could reasonably ascertain the pertinent requirement, and retroactive application of a rule prohibiting safe-harbor allocation of wireless toll revenues would be unfair and unlawful.

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To: The Commission

PETITION FOR DECLARATORY RULING OF CINGULAR WIRELESS LLC

Pursuant to Section 1.2 of the Commission's Rules,[1] Cingular Wireless LLC ("Cingular") requests that the Commission issue a Declaratory Ruling regarding the allocation of wireless toll revenues between the intrastate and interstate jurisdictions[2] for purposes of the Commission's Forms 499-A and 499-Q and their predecessor forms. Specifically, Cingular asks the Commission to declare that:

(1) consistent with its repeated and specific statements in numerous orders, wireless carriers have been permitted to allocate *all* of their end-user telecommunications revenues, including "toll" revenues, using the "wireless safe harbor;" and

(2) to the extent it alters this policy in the future, it will not apply its new approach retroactively prior to the date of such an order and will not seek to enforce any additional regulatory contribution obligations that would arise from such retroactive application or any associated late-payment fees.

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[1] 47 C.F.R. § 1.2.

[2] For purposes of this Petition, the distinction between "interstate" and "international" revenues is immaterial. Thus, we use "interstate" to signify "interstate and international."

These findings are warranted by the Commission's repeated rulings, published in the Federal Register, that carriers may allocate all end-user telecommunications revenues using the safe harbor; Cingular's reasonable reliance thereon; and the harm that Cingular would face if forced to make back-payments with little chance of recovery from end users. The Commission may change its position on a going-forward basis,[3] but given these facts, retroactive application would be unfair and unlawful.

I. BACKGROUND

A. Commission and Bureau Orders Have Consistently Authorized Safe-Harbor Allocation of All End-User Telecommunications Revenues.

Since the inception of the wireless safe harbor, the Commission and the Wireline Competition Bureau have stated on at least six occasions that wireless carriers may use the safe harbor to allocate all of their end-user telecommunications revenues.

In its 1997 *NECA Order*, the Commission established the Universal Service Administrative Corporation ("USAC"), and required universal service contributors to file Worksheets containing information regarding their end-user telecommunications revenues at regular intervals.[4] Following release of the *NECA Order*, parties sought clarification regarding how they were to report and allocate revenue data that could not be derived from their financial

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[3] *See, e.g., B&J Oil & Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004) ("[A]gencies may change their policies as long as they engage in reasoned decisionmaking and explain their breaks with precedent"). This Petition does *not* express any view on whether carriers should be permitted to use the wireless safe harbor to allocate toll revenues going forward.

[4] *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 18400 at 18418, 18424, 18442 ¶¶ 30, 43, 80 (1997) ("*NECA Order*").

records. The Commission responded to these requests in the *NECA II Order*.[5] There, the Commission announced that "contributors that cannot derive interstate revenues from their books of account or cannot derive the line-by-line revenue breakdowns from their books of account may provide on the Worksheet good faith estimates of these figures."[6]

In 1998, the Commission supplemented the "good faith estimate" approach by adopting a default "safe harbor" that CMRS providers could use to "approximate the percentage of interstate wireless telecommunications revenues generated by each category of wireless telecommunications provider."[7] The Commission noted the wireless industry's concern that "wireless telecommunications providers cannot, without substantial difficulty, identify their revenues as interstate or intrastate."[8] This was so for a variety of reasons, including network technology configurations, service area boundaries, and the nature of mobile service. Notably, the allocation problems cited by the Commission applied to *any* type of CMRS traffic, including toll traffic:

> [CMRS] providers maintained that they operate without regard to state boundaries in that their service areas, and areas served by a particular antenna, do not correspond to state boundaries.... CMRS providers explained that because they often use a single switch to serve areas located in more than one state, calls originating and terminating in one state may be transported to a switch in another state. These providers suggested that the mobile nature of CMRS makes it difficult to determine whether the calls made by their customers should be classified as interstate or intrastate. Even if they were able to identify the jurisdictional nature of each call, CMRS providers noted

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[5] *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 12444 (1997) ("*NECA II Order*").

[6] *Id.* at 12453 ¶ 21.

[7] *See Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 21252, 21257-58 ¶ 11 (1998) ("*1998 Safe Harbor Order*").

[8] *Id.* at 21235 ¶ 6.

> that the jurisdictional nature of the call could change during the course of the call.[9]

For cellular and broadband PCS providers, the Commission therefore "establish[ed] a safe harbor percentage of interstate revenues for cellular and broadband PCS providers of 15 percent of their *total cellular and broadband PCS telecommunications revenues*."[10] This language was included in the Federal Register summary of the *1998 Safe Harbor Order*.[11]

The 15 percent CMRS safe harbor was based on the percentage of interstate wireline traffic reported for purposes of the Dial Equipment Minutes (DEM) weighting program, which reflects *all* minutes of use, including toll minutes.[12]

Importantly, nothing in the *1998 Safe Harbor Order* restricted a carrier's ability to allocate revenues jurisdictionally according to a "good faith estimate" that differed from the safe harbor percentage. Rather, the Commission specified that the "safe harbor" represented only a

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[9] *Id.* at 21255-56 ¶ 6 (internal citations omitted).

[10] *Id.* at 21258-59 ¶ 13 (emphasis added). The Commission adopted a separate 12 percent safe harbor for paging providers and a 1 percent safe harbor for analog SMR dispatch providers. *See id.* at 21259-60 ¶¶ 14-15.

[11] *Federal-State Joint Board on Universal Service*, 63 Fed. Reg. 68208, 68208 (Dec. 10, 1998).

[12] *See 1998 Safe Harbor Order*, 13 F.C.C.R. at 21258-59 ¶ 13. Dial equipment minutes are the minutes of holding time of the originating and terminating local dial switching equipment (i.e., the time local switching equipment is in actual use either by a customer or an operator). The purpose of DEM "weighting" has traditionally been to assist small LECs such that the DEM is "weighted" "(i.e., multiplied) to allocate a higher percentage of local switching costs to the interstate jurisdiction." *See 1993 Annual Access Tariff Filings*, 12 F.C.C.R. 6277, 6287 ¶ 13, n.44 (1997). The DEM weighting program has incorporated both local and toll traffic; indeed, toll traffic was an integral component of the weighting methodology. *See Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 618 (D.C. Cir. 2000) (explaining that "the FCC allowed certain small, generally rural LEC's to weight their DEM totals with a 'toll weighting factor,' thereby providing LECs with a higher cost basis on which their federal access charge would be based").

"suggested" percentage, and noted its expectation that some carriers might employ good-faith estimates that differed from that percentage.[13]

In 2001, the Commission sought comment on various matters relating to USF contributions, including whether the wireless safe harbor should be modified.[14] In its Notice of Proposed Rulemaking, the Commission again made clear that under the safe harbor, "[i]nstead of reporting their actual interstate and international end-user telecommunications revenues, wireless carriers may simply report a fixed percentage of revenues, which ranges from one to 15 percent."[15] The Commission observed that the safe harbor might need to be amended, because "the actual percentage of interstate telecommunications may now significantly exceed the safe harbor percentages."[16]

After receiving comment, the Commission revised the wireless safe harbor from 15 percent to 28.5 percent.[17] Like the original 15 percent safe harbor, the 28.5 percent safe harbor

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[13] *Id.* at 21257-58 ¶ 11.

[14] *Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans With Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability*, 16 F.C.C.R. 9892 (2001) ("*Safe Harbor Modification NPRM*").

[15] *Id.* at 9899-9900 ¶ 11.

[16] *Id.* at 9904-05 ¶ 24.

[17] *Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone*
(continued on next page)

was based on evidence regarding *overall* minutes of use.[18] Indeed, in explaining the modification, the Commission highlighted its "conclu[sion] that a 15 percent interim mobile wireless safe harbor no longer reflect[ed] the extent to which mobile wireless consumers utilize their wireless phones for interstate calls, particularly in light of the increased substitution of wireless for traditional wireline service."[19] Most important, in the *2002 Safe Harbor Modification Order*, the Commission clearly restated its view that "[m]obile wireless providers availing themselves of the revised interim safe harbor will be required to report 28.5 percent *of their telecommunications revenues* as interstate."[20] This language was included in the Federal Register summary of the *2002 Safe Harbor Modification Order*.[21]

Orders released in the wake of the *2002 Safe Harbor Modification Order* reiterated the view that the wireless safe harbor could be applied to *all* of a wireless carrier's end-user telecommunications revenue. In a January 2003 order reconsidering an aspect of the *2002 Safe Harbor Modification Order*, the Commission stated expressly that "[f]or wireless telecommunications providers that avail themselves of the interim safe harbors, the interstate telecommunications portion of the bill would equal the relevant safe harbor percentage times the *total* amount of telecommunications charges on the bill."[22] In 2005, the Wireline Competition

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Number Portability, Truth-in-Billing and Billing Format, 17 F.C.C.R. 24952 (2002) ("*2002 Safe Harbor Modification Order*").

[18] *2002 Safe Harbor Modification Order*, 17 F.C.C.R. at 24966 ¶ 24 (emphasis added). Specifically, the Commission relied on carrier-specific data submitted by CTIA reflecting the proportion of all minutes-of-use that were interstate.

[19] *Id.* at 24965-66 ¶ 21.

[20] *Id.* at 24966 ¶ 24 (emphasis added).

[21] *Federal-State Joint Board on Universal Service*, 67 Fed. Reg. 79525, 79526 (Dec. 30, 2002).

[22] *Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability,*
(continued on next page)

Bureau asserted that the Commission's rules "permit those utilizing the safe harbor procedure to report as interstate, for contribution purposes, 28.5 percent of their *total end user telecommunications revenues*...."[23]

In 2003, USAC retained Deloitte & Touche LLP to conduct an audit of the processes used by Cingular subsidiaries Southwestern Bell Wireless, Inc. ("SWBW") and Southwestern Bell Mobile Systems, Inc. ("SWBMS") (collectively, the "Subsidiaries") to complete the applicable Worksheets for calendar years 2000 and 2001. USAC subsequently determined that, for their 2001 Worksheets, the subsidiaries had "incorrectly applied the safe harbor percentage in 2001 to revenue line items" associated with toll revenues, which USAC asserted were "not appropriate for safe harbor use."[24] According to USAC, the purportedly necessary "correction of the misappropriate use of the safe harbor percentage result[ed] in" significant underpayments in 2001.[25] Cingular explained that its approach was consistent with the Commission's orders. Nevertheless, in letters dated January 31, 2006, USAC informed Cingular that it "must revise its [2001] FCC 499-A revenue reports" for the affected subsidiaries by Monday, April 3, 2006. On March 31, 2006, pursuant to sections 54.719(c) and 54.721 of the Commission's rules, Cingular

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and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format, 18 F.C.C.R. 1421, 1425 ¶ 8 n.24 (2003) ("*Reconsideration Order*") (emphasis added).

[23] *See Federal-State Joint Board on Universal Service, Access Charge Reform, Petition for Reconsideration and Clarification of the Fifth Circuit Remand Order of BellSouth Corporation*, 20 F.C.C.R. 13779, 13782 ¶ 8 (WCB 2005) (emphasis added) ("*2005 WCB Order*").

[24] *See* IAD Report to Ms. Anne Marie Trew, Acting Head of Finance, USAC, Re: SWBW, USAC Audit No. CR2004FL011, dated Oct. 29, 2004, at 3 ("IAD SWBW Report"); IAD Report to Ms. Anne Marie Trew, Acting Head of Finance, USAC, Re: SWBMS, USAC Audit No. CR2004FL012, dated Oct. 29, 2004, at 3 ("IAD SWBMS Report").

sought review of USAC's decisions before the Commission's Wireline Competition Bureau.[26] That request – which, unlike this Petition, only addresses a discrete period – remains pending.

In June 2006, the Commission again revised the wireless safe harbor.[27] The *2006 Safe Harbor Modification Order* increased the wireless safe harbor percentage from 28.5 percent to 37.1 percent. As with previous safe harbors, the new 37.1 percent wireless safe harbor was based on an analysis examining *all* wireless minutes of use.[28]

While the *2006 Safe Harbor Modification Order* did address toll revenues, nothing in that order suggested that carriers relying on the wireless safe harbor could not use the safe harbor to allocate all of their revenues. The order provides, in relevant part, as follows:

> In addition to revising the wireless safe harbor, we take an additional step to address concerns that wireless telephony providers *who report actual interstate revenues* may not be doing so accurately. Specifically, we require any wireless telephony provider *that uses a traffic study to determine its actual interstate revenues for universal service contribution purposes* to submit the traffic study to the Commission and to USAC for review.... [W]e are concerned that itemized charges for toll service on wireless telephony customers' bills that should be reported as toll service revenues on FCC Form 499-A are not being properly reported.

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[25] IAD SWBW Report at 3-4; IAD SWBMS Report at 3-4.

[26] Cingular Wireless, LLC, *Request for Review of Decisions of Universal Service Administrator,* in CC Docket Nos. 96-45 and 97-21 (filed Mar. 31, 2006) ("USAC Appeal"); *see also* Letter from Ben G. Almond, Cingular, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45 & 97-21 (filed July 26, 2006).

[27] *See Universal Service Contribution Methodology, et al.*, WC Docket No. 06-122 *et al.*, Report and Order and Notice of Proposed Rulemaking, FCC 06-94 (rel. June 27, 2006) ("*2006 Safe Harbor Modification Order*").

[28] *See* Letter from Mitchell F. Brecher, Counsel for TracFone, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170 (filed June 14), 2005; *see also 2006 Safe Harbor Modification Order* at ¶ 25 & nn. 95-97. Because TracFone did not provide the underlying analysis, but rather only the results, it is impossible to determine the precise methodology used. However, there is *no indication* (and no reason to believe) that the study of bill harvesting data submitted by TracFone excluded toll minutes in these proportions.

> Toll services are telecommunications services that enable customers to communicate outside of their local exchange calling areas. Many wireless telephony customers subscribe to plans that give them fixed amounts of minutes which can be used either for local or long distance service. Other wireless telephony customers, however, pay by the minute for some or all calls. For long distance service, the charge is often made up of an air time charge that is the same for local and long distance calls, and an additional toll charge that applies only to long distance calls. For some wireless telephony providers, toll service revenues include these additional charges for intrastate, interstate, and international toll calls. Commission staff analysis, however, raises the concern that some filers are not reporting their separately stated toll revenues correctly.[29]

This language, of course, does not say anything about prohibiting carriers from allocating their toll revenues using the safe harbor. In fact, elsewhere in the Order, the Commission stated that "mobile wireless providers that choose to use the revised interim safe harbor must report 37.1 percent *of their telecommunications revenues* as interstate ...."[30] Like the corresponding language in the *1998 Safe Harbor Order* and the *2002 Safe Harbor Modification Order*, this language was published in the Federal Register Summary of the *2006 Safe Harbor Modification Order*.[31]

B. For Several Years, the Worksheet Instructions Have Appeared to Be in Conflict With the Commission's Clear Statements Permitting Safe-Harbor Allocation of All End-User Telecommunications Revenues.

Notwithstanding the numerous clear Commission rulings described above, with no explanation, the Worksheet Instructions have been amended over the past several years to reflect a framework different from that adopted in the related Commission orders.

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[29] *2006 Safe Harbor Modification Order* at ¶ 29 (emphasis added) (footnotes omitted).

[30] *2006 Safe Harbor Modification Order* at ¶ 27 (emphasis added).

[31] *Federal-State Joint Board on Universal Service; IP-Enabled Services*, 71 Fed. Reg. 38781, 38783 (July 10, 2006).

The first Worksheet Instructions issued following the *1998 Safe Harbor Order* did not forbid safe-harbor allocation of wireless toll revenues, or otherwise mention the safe harbor in any respect. The next year, the Commission issued revised instructions with its *Consolidated Reporting Order*.[32] That order emphasized that, apart from changes to the filing process, the relevant forms, and the filing deadlines, it was "not revisit[ing] the substantive requirements of the support and cost recovery mechanisms, the class of contributors to each mechanism, or the services whose revenues are included in contribution bases."[33] The appended Worksheet, however, included amended Instructions addressing the safe harbor's application. As described above, the Commission stated in the *Consolidated Reporting Order* that the order made no substantive change in the Commission's contribution requirements. Nevertheless, the new Instructions stated (for the first time) that the safe harbor itself was available for use on the Worksheet lines associated with "mobile services,"[34] and that "toll charges to mobile service customers" were to be excluded from these lines.[35] Separately, the Instructions directed filers to account for "[t]oll charges to mobile service customers" on lines that were not subject to safe-harbor allocation.[36]

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[32] *See 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, 14 F.C.C.R. 16602 (1999) ("*Consolidated Reporting Order*").

[33] *Id.* at 16605 ¶ 5.

[34] *See, e.g.*, 2000 Instructions at 15.

[35] *See, e.g.*, 2000 Instructions at 17.

[36] *See Consolidated Reporting Order*, 14 F.C.C.R. at 16696 Appx. D; 2000 Instructions at 15. The revised Instructions did *not*, however, indicate that carriers were prohibited from using good-faith estimates to allocate wireless revenues, toll or otherwise. To the contrary, these Instructions stated that where "interstate and international revenues cannot be determined directly from corporate books of account or subsidiary records," a carrier "may provide on the

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Although the *2002 Safe Harbor Modification Order* had stated that "[m]obile wireless providers availing themselves of the revised interim safe harbor will be *required* to report 28.5 percent of *their telecommunications revenues* as interstate"[37] the revised versions of FCC Forms 499A and 499Q attached to that order added new language to the contrary. After describing the safe harbors for wireless, paging, and analog dispatch services, the new Instructions stated as follows:

> These safe harbor percentages may not be applied to the universal service pass-through charges, fixed local service revenues, or toll service charges. All filers must report the actual amount of interstate and international revenues for these services. For example, toll charges for itemized calls appearing on mobile telephone customer bills should be reported as intrastate, interstate or international based on the origination and termination points of the calls.[38]

The revised Instructions attached to the *2006 Safe Harbor Modification Order* contained the same language used in previous years with regard to the treatment of wireless toll revenues.

Notably, the instructions have never explained definitively just what wireless revenues are "toll" revenues in the first place. The Instructions have defined "toll services" only as "telecommunications services, wireline or wireless, *that enable customers to communicate outside of local exchange calling areas.*"[39] As described in further detail below, however, the

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worksheet good faith estimates of these figures." Nor did the instructions prohibit use of an estimate that matched the applicable safe-harbor percentage.

[37] *2002 Safe Harbor Modification Order* at 24966 ¶ 24 (emphasis added).

[38] 2003 Instructions at 18. This language was included as an Appendix to the *Safe Harbor Modification Order*, but at the time had not received OMB approval and was merely "attached for informational purposes." The revised Form was not approved until March of 2003. *See* 68 Fed. Reg. 12353 (Mar. 14, 2003). Further, while Section 54.711(a) expressly requires that the Form 499-A be published in the Federal Register, the Commission has never complied with this requirement.

[39] *See, e.g.*, 2000 Instructions at 17 (emphasis added).

concept of a "local exchange calling area" does not translate to CMRS networks. Nor do the Instructions address the proper treatment of "toll" revenues collected as part of a fixed charge paid by a consumer for a bucket of minutes. Thus, even if they had been clear and uncontradicted by Commission orders with regard to the proper treatment of wireless "toll" revenues, the Instructions have never provided clear guidance as to just what revenues fall into that category.[40]

II. DISCUSSION

The Commission has stated clearly and repeatedly that wireless carriers may utilize the wireless safe harbor to allocate *all* of their end-user telecommunications revenues. Cingular takes no position here on how the Commission should treat wireless toll revenues prospectively. However, the Commission should declare that, until such time as it adopts a contrary policy, the law permits and has permitted wireless carriers to allocate *all* of their end-user telecommunications revenues, including toll revenues, using the wireless safe harbor. Further, the Commission should declare that, given the existing rulings, it will not apply any new rule prohibiting safe-harbor allocation of wireless toll revenues *retroactively* to any period before the effective date of its order adopting any revised approach, and will not seek back-payment of any increased contribution obligations that would arise from such retroactive application or associated late-payment fees.[41] Thus, if the Commission should decide to alter its prior clear

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[40] While summaries of the associated Orders have appeared in the Federal Register, the Worksheet Instructions themselves have never been published therein.

[41] Although the safe harbor arose in the context of universal service contributions, the jurisdictional allocation of carriers' end-user telecommunications revenues is relevant to any regulatory program assessing contributions based on "interstate" revenues. Thus, for example, the issue described in this Petition also may affect Telecommunications Relay Service Fund
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statements permitting such use of the safe harbor, that new interpretation should be applied prospectively only. Retroactive application of a policy departing from the Commission's clear and consistent rulings, upon which Cingular has reasonably and detrimentally relied, would be unfair and unlawful.

A. The Commission Should Declare that the Law To Date Has Permitted Wireless Carriers to Allocate All End-User Telecommunications Revenues, Including Toll Revenues, Using the Safe Harbor.

First, the Commission should confirm what it has already stated on many occasions: Since it instituted the wireless safe harbor, CMRS providers have been entitled to allocate all of their end-user telecommunications revenues – including toll revenues – using the applicable safe harbor percentage.

The Commission's and Bureau's rulemaking decisions since the original 1998 *CMRS Safe Harbor Order* have consistently confirmed that the CMRS Safe Harbor applies to *all* of a CMRS provider's end-user telecommunications revenues:

- In its *1998 Safe Harbor Order*, the Commission explained that it was "establish[ing] a safe harbor percentage of interstate revenues for cellular and broadband PCS providers of *15 percent of their total cellular and broadband PCS telecommunications revenues*."[42]

- In its 2001 *Safe Harbor Modification NPRM*, the Commission stated that "[i]nstead of reporting their actual interstate and international end-user telecommunications revenues, wireless carriers may simply report a fixed percentage of revenues, which ranges from one to 15 percent."[43]

- In its 2002 *Safe Harbor Modification Order*, the Commission confirmed that "[m]obile wireless providers availing themselves of the revised interim safe harbor will be required to report 28.5 percent *of their telecommunications revenues* as interstate."[44]

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contributions, North American Numbering Plan Administrator contributions, and local number portability contributions.

[42] *1998 Safe Harbor Order*, 13 F.C.C.R. at 21258-59 ¶ 13 (emphasis added).

[43] *Safe Harbor Modification NPRM*, 16 F.C.C.R. at 9899-9900 ¶ 11.

[44] *2002 Safe Harbor Modification Order*, 17 F.C.C.R. at 24966 ¶ 24 (emphasis added).

- In its 2003 *Reconsideration Order*, the Commission again confirmed that "[f]or wireless telecommunications providers that avail themselves of the interim safe harbors, the interstate telecommunications portion of the bill would equal the relevant safe harbor percentage times *the total amount of telecommunications charges on the bill.*"[45]

- In 2005, the Bureau described the CMRS Safe Harbor percentage (which had increased to 28.5 percent) as "permit[ting] those utilizing the safe harbor procedure to report as interstate, for contribution purposes, [a higher] 28.5 percent *of their total end user telecommunications revenues* ...."[46]

- In the most recent *2006 Contribution Order*, the Commission increased the safe harbor percentage further, but again stated that "mobile wireless providers that choose to use the revised interim safe harbor must report 37.1 percent *of their telecommunications revenues* as interstate ...."[47]

These statements, which the Commission has never repudiated, have the force of rules. The APA defines "rule" to mean an "agency statement of general or particular applicability and future effect."[48] As the Supreme Court has made clear, under the APA, "[t]he rulemaking requirements include publication in the Federal Register of notice of the proposed rulemaking and hearing; an opportunity for interested persons to participate; a statement of the basis and purpose of the proposed rule; and publication in the Federal Register of the rule as adopted."[49] These requirements have all been met here: The Commission statements quoted above are of "general ... applicability and future effect." The Commission's safe-harbor requirements were adopted pursuant to notice-and-comment rulemakings initiated by Notices published in the

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[45] *Reconsideration Order*, 18 F.C.C.R. at 1425 ¶ 8 n.24 (emphasis added).

[46] *2005 WCB Order*, 20 F.C.C.R. at 13782 ¶ 8 (emphasis added).

[47] *2006 Contribution Order* at ¶ 27 (emphasis added).

[48] *See* 5 U.S.C. § 551(4).

[49] *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 290 n.21 (1974). *See also* 5 U.S.C. § 552(a)(1) (requiring agencies to publish "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general

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Federal Register. The Commission has explained their "basis and purpose." Finally, the language used in the *1998 Safe Harbor Order*, the *2002 Safe Harbor Modification Order*, and the *2006 Safe Harbor Modification Order* has been published in the Federal Register.[50] Thus, these statements constitute "rules" under the APA.

In contrast, the Instructions are *not* rules. As courts and the Commission have indicated, even validly adopted "requirements" are not accorded the force of rules when they are not published in the Federal Register.[51] Here, of course, the Instructions' approach to toll revenue allocation has *never* been explained in a Commission order, and the Instructions themselves have *never* been published in the Federal Register – even though the Commission's rules expressly state that they must be.[52] Moreover, the Commission has never explained the basis or purpose of

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applicability formulated and adopted by the agency," as well as "each amendment, revision, or repeal of the foregoing," in the Federal Register).

[50] *Federal-State Joint Board on Universal Service; IP-Enabled Services*, 71 Fed. Reg. 38781, 38783 (July 10, 2006); *Federal-State Joint Board on Universal Service*, 67 Fed. Reg. 79525, 79526 (Dec. 30, 2002); *Federal-State Joint Board on Universal Service*, 63 Fed. Reg. 68208, 68208 (Dec. 10, 1998).

[51] *See, e.g.*, *Angle v. United States*, 709 F.2d 570, 577 (9th Cir. 1983) (where agency rule was followed by two memoranda amending the rule, original requirement was the only binding "rule" because memoranda were not published in the Federal Register); *Appalachian Power Co. v. Train*, 586 F.2d 451, 455 (4th Cir. 1977) (even where an EPA "development document" constituted substantive rule of general applicability, document's requirements were inoperative because document was not published in the Federal Register); *Nelson Broadcasting Co.*, 6 F.C.C.R. 1765, 1765 ¶¶ 3-4 (1991) (determining that requirement set forth in text of Commission order was not binding because statement was not itself published in the Federal Register).

[52] Section 54.711(a) of the Commission's rules provides that "[c]ontributions shall be calculated and filed in accordance with the Telecommunications Reporting Worksheet which shall be published in the Federal Register." 47 C.F.R. § 54.711(a). However, because contributors only file revenue data, and the Commission and its agents "calculate" contributions, this statement appears to reflect the Commission's declaration of its *own* approach, rather than to impose a requirement on filers. This provision does not, therefore, transform an unpublished Instruction into a rule. Moreover, even if it were intended to do so, that intent is undermined by the declaration that the Worksheet "shall be published in the Federal Register," which has never been fulfilled.

the Instructions' prohibition against safe-harbor allocation of toll revenues. In particular, the Commission has not explained how such a prohibition can be reconciled with the difficulties faced by wireless carriers in identifying and segregating "toll" revenues – the very difficulties the safe harbor was intended to address in the first place.

Faced with a Commission rule "requir[ing]" carriers using the safe harbor to allocate all of their end-user revenues using the safe harbor on the one hand,[53] and an unpublished "Instruction" suggesting otherwise, the rule requiring such allocation clearly governs. To minimize any confusion that might result from the existence of potentially inconsistent Worksheet Instructions, the Commission should expressly declare that its statements have, in fact, accurately represented its policy with regard to the allocation of wireless carriers' end-user telecommunications revenue. This declaration would not only confirm the Commission's repeated statements. It would also be most consistent with the underlying purpose behind adoption of the safe harbor (which was to simplify reporting for wireless carriers, whose billing and revenue structures do not match those of wireline provides) and with the Commission's recognition that wireless toll revenues may be particularly difficult to classify.

B. The Commission Should Declare that In the Event it Changes its Approach to the Allocation of Wireless Toll Revenues, its New Policy Will Only Apply Prospectively.

The Commission obviously can change its previous policies regarding revenue allocation. It cannot, however, retroactively apply such a change where parties have reasonably relied on the past policy and where such retroactive application will subject them to costs that cannot be recovered from customers.

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[53] *2002 Safe Harbor Modification Order*, 17 F.C.C.R. at 24966 ¶ 24 (emphasis added).

On numerous occasions, the courts have held that when an agency replaces an established rule with a novel approach, it may not apply its new interpretation retroactively. "[A] decision branding as 'unfair' conduct stamped 'fair' at the time a party acted[] raises judicial hackles,"[54] particularly where the established rule "has been generally recognized and relied on throughout the industry [the relevant agency] regulates." [55] The courts have made clear that in such circumstances, retroactive application of a new interpretation would violate core "notions of equity and fairness."[56]

The Commission, of course, has incorporated these principles into its decisions.[57] Just weeks ago, in its order determining that menu-driven calling card services were properly classified as "telecommunications services" under the Communications Act of 1934, as amended (the "Act"),[58] the Commission opted *not* to seek retroactive payment of USF and other regulatory obligations. Although the Commission is entitled to demand contributions from the providers of telecommunications services – which are classified as "telecommunications carriers" under the

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[54] *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966).

[55] *See AT&T Co. v. FCC*, No. 05-1096, Slip Op. at 5 (D.C. Cir. July 14, 2006).

[56] *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998). As the Supreme Court has explained, because an agency has "the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason [than a court] to rely upon *ad hoc* adjudication to formulate new standards of conduct" that will be applied to parties retroactively. *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

[57] *See, e.g., Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 F.C.C.R. 7457, 7471 ¶ 22 (2004) ("The courts have made clear that retroactive effect may be denied if the equities so require. The Supreme Court found in *SEC v. Chenery* that 'retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.' The D.C. Circuit has explained that whether to permit retroactive application of an agency decision 'boil[s] down to . . . a question grounded in notions of equity and fairness.'" (internal citations omitted)).

[58] *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order ¶ 11 (rel. Jun. 30, 2006) ("*2006 Calling Card Order*").

Act – the Commission stated that its prior decisions "did not clearly point in the direction of treating providers of menu-driven prepaid calling cards as telecommunications carriers."[59] Indeed, "given the state of the law at the time, parties may have relied on the assumption that [their services] would not be subject to" particular regulatory obligations.[60] Under these circumstances, the Commission determined, retroactive application of the Commission's decision would "be so unfair ... as to work a manifest injustice."[61] The same is true here.

1. Retrospective application of a decision prohibiting safe-harbor allocation of wireless toll revenues would constitute impermissible retroactive rulemaking.

The Commission's numerous statements permitting – and in at least one case *requiring*[62] – safe-harbor allocation of wireless toll revenues, issued in rulemaking orders and on three occasions published in the Federal Register, constitute "rules" under the APA; the Instructions to the contrary do not.[63] The Commission is free to change its rules regarding the allocation of revenues, but the APA prohibits it from "alter[ing] the past legal consequences of past actions" – that is, from engaging in so-called *retroactive rulemaking*.[64] Specifically, the Commission may not adopt a rule that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[65] To the extent it resulted in increased contribution obligations, retroactive application of a decision barring safe-harbor allocation of toll revenues would clearly "increase [Cingular's]

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[59] *Id.* at ¶ 45.
[60] *Id.*
[61] *Id.* (internal quotations omitted).
[62] *See 2002 Safe Harbor Modification Order*, 17 F.C.C.R. at 24966 ¶ 24.
[63] *See supra* Part II.A.
[64] *See Bowen v. Georgetown University Hospital,* 488 U.S. 204, 219 (1988).
[65] *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994).

liability for past conduct, or impose new duties with respect to transactions already completed." Thus, while the Commission is free to adopt a rule prohibiting such allocation of wireless toll revenues going forward, it may not apply such a rule retrospectively.

2. Even if retrospective application of a decision prohibiting safe-harbor allocation of wireless toll revenues did not constitute retroactive rulemaking, the relevant equitable factors all weigh against retroactivity here.

Even aside from the *per se* legal bar on retroactive rulemaking, equitable concerns render retroactive application of any new decision regarding revenue allocation inappropriate here. Indeed, in this matter, all of the factors that courts traditionally examine in determining whether retroactive application of an agency's decision is appropriate weigh against retroactivity. While different courts have phrased the inquiry in different ways, the most prominent framework for conducting such evaluations was enunciated in the D.C. Circuit's 1972 decision regarding a new adjudicative rule in *Retail, Wholesale and Department Store Union v. NLRB*:[66]

> Among the considerations that enter into a resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[67]

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[66] 466 F.2d 380 (D.C. Cir. 1972). This framework was later elaborated by the D.C. Circuit's 1987 decision in *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074 (D.C. Cir. 1987).

[67] *Retail, Wholesale Union*, 466 F.2d at 390. *See also Chenery*, 332 U.S. at 203 ("Retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law."); *District Lodge 64, Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 949 F.2d 441, 447 (D.C. Cir. 1991) (considering whether "(1) the decision creates a new rule ... (2)
(continued on next page)

Each of these factors militates against retroactive application of any future Commission determination that the safe harbor may not be used to allocate wireless toll revenues.

First, in the event that the Commission formally repudiates its prior clear statements and instead prohibits safe-harbor allocation of wireless toll revenues, that decision would not be a matter of "first impression." The Commission has made clear not only once, but on at least *six* occasions, that a wireless carrier may apply the safe harbor to *all* of its end-user telecommunications revenues. On at least one occasion, it has stated that a wireless carrier using the safe harbor *must* allocate all of its revenues in this manner. Moreover, these statements were published in the Federal Register on three occasions, putting all interested parties on constructive notice of this Commission rule. Thus, far from a matter of "first impression," this would be a matter in which a "new liability is sought to be imposed ... for past actions which were taken in good-faith reliance on [agency] pronouncements."[68]

This case is thus unlike that presented in the D.C. Circuit's recent decision addressing a previous Commission order regarding calling-card services. There, the court permitted retroactive application of the Commission's designation of certain AT&T calling-card services as "telecommunications services." The court emphasized, however, that in the order announcing that designation, "the classification of AT&T's enhanced prepaid calling card service was before the Commission *for the first time*."[69] Furthermore, "it [was] difficult to discern any clear policy"

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retroactive application will be more likely to hinder than to further the operation of the new rule ... and (3) retroactive application would produce "substantial inequitable results'"); *Cassell*, 154 F.3d at 486 (noting that Clark-Cowlitz factors "boil down ... to a question of concerns grounded in notions of equity and fairness.").

[68] *NLRB v. Bell Aerospace Co.*, 416 U.S. at 295.

[69] *AT&T v. FCC*, No. 05-1096, Slip Op. at 6.

in the Commission's previous orders addressing similar issues.[70] Here, in contrast, the Commission has addressed the specific issue on multiple occasions, expressing a "clear policy" that all wireless end-user telecommunications revenues may be allocated using the safe harbor.

The existence of an Instruction forbidding use of the safe harbor with regard to wireless toll revenues in no way undermines this analysis. What matters for purposes of this prong is whether the agency's action represents "a new policy for a new situation" – that is, whether it simply applies existing law to a new fact pattern not addressed by previous agency decisions.[71] Here, the Commission *has* addressed the central question, *directly*, in numerous rulemaking decisions. The presence of an entirely unexplained Instruction that is directly contradicted by these numerous statements does not transform the question of toll-revenue allocation into a matter of "first impression."[72]

Second, for the same reasons, a decision forbidding safe-harbor allocation of wireless toll revenues would "represent[] an abrupt departure" from these numerous direct Commission statements permitting wireless carriers to utilize the safe harbor to allocate *all* of their wireless revenues. While courts have permitted retroactive application of decisions where the agency "simply did not have a policy" regarding the subject before applying the ruling retrospectively,[73] that description is clearly inapposite here. Indeed, as demonstrated above, the Commission and the Wireline Competition Bureau (exercising the Commission's delegated authority) have clearly declared the Commission's policy permitting (or even *mandating*) safe-harbor allocation of all

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[70] *Id.* at 7.

[71] *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1110 (D.C. Cir. 1987).

[72] Nor does the presence of this Instruction render Cingular's reliance on the Commission's clear statements unreasonable, as discussed below.

[73] *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1553 (D.C. Cir. 1993).

end-user telecommunications revenues in at least *six* different orders, including one released *less than six weeks ago*. There can be no argument, then, that a decision adopting the Instructions' approach to revenue allocation would merely "fill a void in an unsettled area of law."[74] Rather, such a decision would "brand[] as 'unfair' conduct stamped 'fair' at the time a party acted,"[75] and should not be granted retrospective effect. The presence of unexplained, unpublished Instructions in direct conflict with the Commission's orders does not change this fact. The Commission's rulemaking decisions are "reasonably clear" (indeed, *explicitly* clear) that the safe harbor applies to *all* of a CMRS provider's end-user telecommunications revenues, and retroactively application of any repudiation of those Commission rulemaking decisions in favor of the inconsistent Instructions is inappropriate for any time prior to such repudiation.[76]

Third, Cingular has reasonably and detrimentally relied to a great extent on the Commission's repeated statements that it was permitted to allocate all of its end-user telecommunications revenues using the wireless safe harbor. As the D.C. Circuit has explained, "the longer and more consistently an agency has followed one view of the law, the more likely it is that private parties have reasonably relied to their detriment on that view."[77] Since the safe harbor's adoption in 1998, various Cingular affiliates and subsidiaries have calculated their USF contributions in reasonable reliance on the Commission's clear pronouncements permitting safe-harbor allocation of all revenues.

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[74] *Retail, Wholesale Union*, 466 F.2d at 390.

[75] *Majestic Weaving*, 355 F.2d at 860.

[76] *See AT&T v. FCC*, Slip Op. at 5; *Verizon Tel. Cos. v. FCC*, 269 F.3d at 1109 (where "there is a 'substitution of new law for old law that was reasonably clear,' a decision to deny retroactive effect is uncontroversial," quoting *Williams Nat. Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 2001)).

[77] *See Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082-83 (D.C. Cir. 1987).

Cingular's reliance on these Commission statements was entirely "reasonable." The Commission had repeatedly declared that carriers are permitted to allocate all end-user telecommunications revenues using the safe harbor. On at least one occasion, it has stated that carriers using the safe harbor *must* allocate all revenues in this manner. On three occasions, these statements have been published in the Federal Register. In short, the Commission's statements have given rise to a Commission rule permitting or requiring safe-harbor allocation of *all* wireless revenues where a carrier uses the safe harbor at all. A carrier is entitled to rely on Commission rules, and – as described above – changes to those rules can only be accorded prospective effect.

Moreover, the rationale underlying the safe harbor, and the specific percentages the Commission has chosen, also lent force to the view permitting safe-harbor allocation of *all* end-user telecommunications revenues. When it first adopted the safe harbor, the Commission acknowledged that wireless revenues defied easy classification into "toll" and "non-toll" categories: Wireless carriers operate without regard to state boundaries, and often serve calls from cell sites and/or mobile switches that may be in different states from the wireless handset. Wireless callers may even cross a state line during a call. Thus, the Commission recognized that it was extremely difficult for wireless carriers to identify the jurisdictional nature of "toll" traffic and "toll" revenues. It was reasonable for wireless carriers to presume that the safe harbor enacted precisely to address that problem would not require them to make such classifications.

Nor did the Instructions or the Commission's orders provide any guidance on how such toll classifications would be made. As discussed above, the Instructions have consistently defined "toll" revenues by reference to "local exchange areas." The term "exchange," however, is an artifact of incumbent LEC networks, generally signifying the wireline connections served by a single wireline switch. Similarly, the concept of "local" does not have the same meaning in

the wireless context as in the wireline context: Whereas wireline local calling areas generally extend only as far as the loops connected to a given switch, wireless carriers have offered a variety of different rate plans featuring "home" calling areas of various sizes.[78] Indeed, during the time period at issue here, many Cingular subsidiaries and predecessor companies employed regional or national rate plans that permit calling at no additional charge over areas much larger than a wireline "local exchange."

Further, CMRS customers typically purchase "buckets" of minutes for fixed charges that do not vary based on whether minutes are used for local or toll calls. The Instructions have not specified how carriers are to account for toll calls falling within these "bucket" charges. While the *2006 Safe Harbor Modification Order* provided some clarification, suggesting that wireless "toll" revenues might be understood to include only additional per-minute charges applied by virtue of a call's long-distance characteristics,[79] carriers obviously could not have been aware of that guidance prior to that order's release just several weeks ago.

Finally, as described above, each of the three specific safe-harbor percentages adopted by the Commission have explicitly reflected *all* wireless minutes of use, assessed via either DEM weighting or traffic studies. That is, these percentages were *derived* on the basis of all intrastate and interstate minutes, suggesting (consistent with the Commission's orders) that the safe harbors were intended to *allocate* revenues derived from all such minutes.

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[78] At least since 1998, when AT&T Wireless pioneered the nationwide "one-rate" plan and the rest of the industry quickly followed, wireless carriers have offered rate plans that allowed customers to make calls nationwide without incurring additional charges. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 20 F.C.C.R. 15908, 15945-46 ¶ 97 (2005).

[79] *2006 Safe Harbor Modification Order* at ¶ 29.

Individually and as a group, these factors – the Commission's statements permitting safe-harbor allocation of all revenues, the continued difficulty in identifying "toll" revenues, the lack of Commission guidance on the definition of toll revenues, and the selection of safe-harbor percentages based on toll and non-toll calls alike – rendered Cingular's approach to revenue allocation entirely reasonable.

The presence of an Instruction appearing to contradict the Commission's clear statements does not at all undermine the reasonableness of Cingular's reliance on those statements. To begin with, that unpublished and unexplained Instruction is not a Commission rule,[80] and hardly trumps the Commission's rule permitting safe-harbor allocation of all end-user telecommunications revenues. Under the APA, new requirements adopted in a rulemaking proceeding must be accompanied by a "concise general statement of their basis and purpose."[81] The Commission has *never* explained the basis or purpose of the Instructions' approach to the allocation of wireless toll revenues. To the extent it *has* addressed the issue, its statements have directly *contradicted* the Instructions' approach. As the D.C. Circuit has made clear, agency actions that are "internally inconsistent and inadequately explained" are "arbitrary and capricious," and are appropriately vacated.[82] An unexplained, arbitrary and capricious "Instruction" cannot render a party's reliance on clear Commission statements unreasonable.

Moreover, reliance by Cingular affiliates and subsidiaries on the Commission's express and repeated statements regarding the wireless safe harbor over the course of more than six years

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[80] *See supra* note 52.

[81] 5 U.S.C. § 553(c). *See generally Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) ("[N]ew rules that work substantive changes in prior regulations are subject to the APA's procedures.").

[82] *See, e.g., Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987).

was clearly "detrimental." During that period, these entities collected USF recovery fees from users that reflected their estimated USF contribution obligations as calculated at the time. The Commission's rules prohibit USF contributors from using line-item USF charges to recover amounts that "exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor."[83] Therefore, in the event that the Commission applies a new interpretation of the safe harbor's applicability retrospectively, and that interpretation results in increased contribution obligations, Cingular may be barred by law from recovering the additional obligations through end-user universal service surcharges. There can thus be no doubt that by failing to recover additional USF fees from its end users (on the basis of its well-founded belief that all of its revenues were properly allocated using the safe harbor), Cingular has relied to its detriment on the Commission's multiple statements allowing safe-harbor allocation of all end-user telecommunications revenues.[84]

Fourth, the burden placed on Cingular (and other carriers) by retroactive application of a rule barring safe-harbor allocation of wireless toll revenues would be extremely high. As described immediately above, should the Commission repudiate its numerous rulemaking

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[83] 47 C.F.R. § 54.712(a). "For example, if a carrier is assessed 10 percent of its interstate telecommunications revenues for purposes of universal service contributions, it may not include a line-item on a subscriber's bill that reflects an amount greater than 10 percent of the interstate portion of the bill." *2005 WCB Order*, 20 F.C.C.R. at 13781 ¶ 8.

[84] Thus, this matter is unlike those in which a court has permitted retroactive application of a rule because the regulated party could not or would not have acted differently had it been able to anticipate that rule's adoption. *See, e.g.*, *Public Service Commission of Colorado v. FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996) ("As we see the issue, the apparent lack of detrimental reliance on the part of the producers is the crucial point. What would they have done differently if they had known in 1983 that they were not entitled to recover the Kansas tax? They could not have raised their prices above the maximum lawful level regardless whether the traffic would have borne such an increase."). Here, but for the Commission's statements regarding the safe harbor's

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decisions addressing the calculation of interstate revenues and retroactively impose additional contribution obligations for previous years, Cingular likely would be restricted in its ability to recover the costs of those contributions from its subscribers.[85] Thus, Cingular would be forced to bear the entire burden of the Commission's about-face – a burden perhaps totaling tens of millions of dollars.

Fifth and finally, the "statutory interest in applying a new rule despite the reliance of a party on the old standard" is minimal in this instance. As the courts have emphasized, this inquiry is meant to assess whether retroactive application of the agency's decision is "necess[ary] ... to effectuate" the statute's purpose.[86] Here, it is not. The Commission and its designated Administrators have already collected and disbursed the funds associated with the reporting periods that would be affected by any retroactive decision. If the Commission were to adopt the Instructions' approach, contributions for all future periods would reflect any related change in revenues subject to federal assessment, *irrespective of whether that decision was applied retroactively.* Retroactive application of such a decision would, at best, result in a one-time contribution windfall. This outcome would do nothing to serve the ends of the affected regulatory programs. It would not, of course, provide more or better service in the past, or provide any additional funding going forward. It would only punish parties that reasonably relied, in good faith, on direct Commission pronouncements. In short, whether or not carriers should be permitted to allocate toll revenues using the safe harbor going forward – a question Cingular does not address here – *retroactive* application of a proscription against such allocation

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application, Cingular could and would have adjusted both its contributions and its related end-user recovery charges.

[85] *See* 47 C.F.R. § 54.712(a).

would penalize carriers for their reliance on the Commission's prior statements, and would do nothing to serve the objectives of the Commission's regulatory programs.

In summary: (1) the Commission has confirmed the safe harbor's application to wireless toll revenues clearly and repeatedly, and the subsequent unexplained insertion of a conflicting Worksheet Instruction cannot trump retroactively its direct and consistent statements; (2) a Commission ruling prohibiting safe-harbor allocation of wireless toll revenues would represent an abrupt departure from those prior statements; (3) Cingular has reasonably and detrimentally relied on the Commission's statements permitting safe-harbor allocation of all wireless revenues over an extended period of time; (4) the burden placed on Cingular by retroactive application of a rule barring safe-harbor allocation of wireless toll revenues would be very high; and (5) such application would not serve any purpose related to the Act or to Commission programs implementing the Act. For these reasons, retroactive application of any policy forbidding safe-harbor allocation of wireless toll revenues would be unlawful. Cingular respectfully requests that the Commission declare this to be so, and thereby remove any lingering uncertainty.

3. Even if the Commission's statements and the Worksheet Instructions *both* constituted "rules," retrospective application of the Instructions' approach would be unfair and unlawful.

As explained above, Worksheet Instructions are not "rules," whereas the Commission's clear and repeated Commission rulings permitting safe-harbor allocation of wireless toll revenues *are* rules.[87] But even if the (unpublished) Instructions merited treatment as rules, they would enjoy no greater status than the (published) statements themselves. In this circumstance, the most that can be said is that parties faced a confused morass of directly contradictory

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[86] *Retail, Wholesale Union*, 466 F.2d at 392.

requirements. In the face of such confusion, retroactive enforcement of the Instructions' approach would be unfair and unlawful.

Any suggestion that the existence of contradictory Commission rules somehow permits retroactive application of a new pronouncement favoring the Instruction would turn the retroactivity doctrine's equitable foundation on its head: As the courts have noted in the enforcement context, a regulated party acting in good faith must be "able to identify, with ascertainable certainty, the standards with which the [Commission] expects parties to conform."[88] Contradictory agency statements do not *enhance* an agency's flexibility; if anything, they *diminish* the agency's power to impose a particular outcome retroactively. Thus, where the Commission's rules provided contradictory instruction regarding where a particular application was to be filed, the D.C. Circuit vacated the Commission's dismissal of an application filed in the "wrong" location: "The Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules. Otherwise the practice of administrative law would come to resemble 'Russian Roulette.'"[89] Thus, in a recent case where Form instructions regarding requirements applied to E-Rate recipients were inconsistent with the relevant rule, the Commission waived the requirements of the more stringent rule so that parties that had complied with the less stringent instructions were not found to be in violation of the rule.[90] The Commission explained there that

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[87] *See supra* Part II.B.

[88] *Trinity Broadcasting v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (quoting *General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)); *see also McElroy Electronics Corp. v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993).

[89] *Satellite Broadcasting Company, Inc. v. FCC*, 824 F.2d 1, 4-5 (D.C. Cir. 1987).

[90] *Schools and Libraries Universal Service Support Mechanism*, 19 F.C.CR. 15808, 15826-28 ¶¶ 51-57.

"it would not serve the public interest to enforce the terms of [the rule] in light of the ambiguity created by the phrasing ... contained in the [form]."[91]

For similar reasons, the Commission should apply any new decision barring safe-harbor allocation of toll revenues retroactively, even if it determines that the relevant Instruction, like its statements regarding the safe harbor, constitutes a "rule." In these circumstances, retroactive application of the Instruction's approach would be both unlawful and grossly unfair.

III. CONCLUSION

For the reasons discussed above, the Commission should declare that:

(1) consistent with its repeated and specific statements in numerous orders, wireless carriers have been permitted to allocate *all* of their end-user telecommunications revenues, including "toll" revenues, using the "wireless safe harbor;" and

(2) to the extent it repudiates this policy in the future, it will not apply its new approach retroactively prior to the date of such an order and will not seek to enforce any additional regulatory contribution obligations that would arise from such retroactive application or any associated late-payment fees.

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[91] *Id.* at 15828 ¶ 57.

Respectfully submitted,

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